

801.12

Verne, B. Michael

From: [REDACTED]
Sent: Thursday, September 19, 2013 11:19 AM
To: Verne, B. Michael; Walsh, Kathryn
Cc: [REDACTED]
Subject: RE: HSR Question -- UPE

Yes. Meant to say Class 1 and 2. Also, yes, Class 1 and Class 2 vote separately for the election of directors and not as a single class. My first thought was yours. However, under 801.1(b). the LLC would not seem to be the UPE because it does not control Company B. While it elects 5 of the 9 directors, it only holds approximately 46% of the outstanding voting securities. Thoughts?

From: Verne, B. Michael [mailto:MVERNE@ftc.gov]
Sent: Thursday, September 19, 2013 11:09 AM
To: [REDACTED] Walsh, Kathryn
Cc: [REDACTED]
Subject: RE: HSR Question -- UPE

[REDACTED] - Still somewhat confusing. We are assuming in the second table you mean Class 1 & Class 2, not Class A & Class B. We are also assuming that, despite the parenthetical, Class 1 and Class 2 vote separately for the election of directors, not together as a single class. If those assumptions are correct, then why isn't the LLC that holds all of the Class 1 stock the UPE? It can elect 5 of 9 directors on its own. What are we missing?

From: [REDACTED]
Sent: Thursday, September 19, 2013 10:52 AM
To: Walsh, Kathryn; Verne, B. Michael
Cc: [REDACTED]
Subject: RE: HSR Question -- UPE

Mike:

To clarify the parentheticals in #4 and #6 below, Class 1 and Class 2 stock is all common stock. Thus from a total outstanding common stock perspective, Class 1 represents approximately 46% of the common stock and Class 2 represents approximately 54% of the common stock as follows:

	Shares of Class 1 Common Stock	Shares of Class 2 Common Stock	Percentage of Total Class 1 & Class 2 Common Stock
Issued and Outstanding Class 1 Shares		35,288,762	46.18%
Issued and Outstanding Class 2 Shares	41,120,128		53.82%

	Shares of Class 1 and Class 2	Percentage of
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	Common Stock	Total Class A & Class B Common Stock
Issued and Outstanding Class A & B Shares:	76,408,890	100%

One other wrinkle, Class 2 common stock is called non-voting because the holder has no voting rights other than the election to Company B's board of 4 of the 9 board directors. In other words with respect to the merger, the members that they elected to Company B's board voted for the transaction but the actual holders of Class 2 common stock did not get to participate in the shareholders' vote for the transaction. In contrast, in addition to having the right to elect 5 of the 9 directors to Company B's board, the holders of class 1 common stock got to participate in the shareholder vote for the transaction.

While this is a wrinkle, under 801.1(f)(1)(i)'s definition of a voting security, the Class 2 common stock would seem to be a "voting security" given that it "entitle[s] the owner or holder thereof to vote for the election of directors of the issuer ..." even though it called non-voting Class 2 common stock by Company B.

Because I have never run into this fact pattern before, I wanted to run it by you to get your views.

Best,

[REDACTED]

From: [REDACTED]
Sent: Thursday, September 19, 2013 9:48 AM
To: 'Walsh, Kathryn (kwalsh@ftc.gov)'; 'mverne@ftc.gov'
Cc: [REDACTED]
Subject: RE: HSR Question -- UPE

Mike and Kate:

I hope all is well. I would like to run something by you in connection with determining the UPE of my client (the seller in a merger transaction).

Here are the facts:

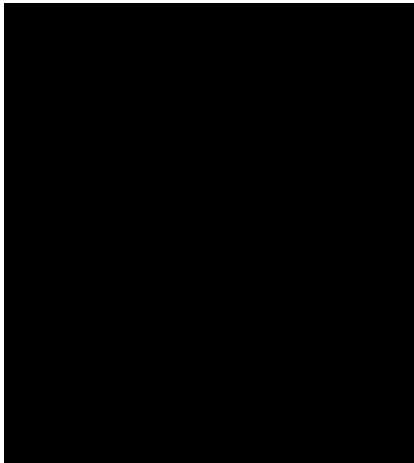
1. Merger between Company A and Company B (the target).
2. Company B is a corporate entity.
3. There are two classes of Company B common stock.
4. Class 1 stock represents 46% of all common stock (Classes 1 and 2 combined).
5. Class 1 stock entitles the holders to vote for 5 of the 9 directors for Company B.
6. Class 2 stock represents 54% of all common stock (Classes 1 and 2 combined)
7. Class 2 stock entitles the holders to vote for 4 of the 9 directors for Company B.
8. Class 1 stock is held by an LLC, which in turn is controlled by a Fund.
9. Class 2 stock is held by individuals investors with the largest investor holding 12.5% of the Class 2 stock.

Analysis

Because Classes 1 and 2 stock each have the right to vote for directors they are voting securities under 801.(f)(1)(i) of the HSR rules. However, Company B is its own UPE because no person holds 50% or more of the outstanding voting securities of Company B.

Appreciate your thoughts.

Best,



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Because applying the formula in § 801.12, LLC holds 55.56%, not 46.18%.

§ 801.12(b) requires calculations of the percentage of voting securities held to be made according to the following formula:

Number of votes of class A held divided by Total votes of class A times Directors elected by class A stock divided by Total number of directors.

In your case, calculating the percentage of voting securities held by LLC:

$$\frac{35,288,762 \text{ (Class 1 votes held by LLC)}}{35,288,762 \text{ (Total Class 1 votes)}} \times \frac{5 \text{ (Number of directors elected by Class 1)}}{9 \text{ (Total number of directors)}} = 55.56\%$$

Bme
9/19/13

KW CONCURS